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12  
13 Attorneys for Plaintiff United States of America

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.  
19

20 PACIFIC GAS AND  
ELECTRIC COMPANY

21 Defendant.  
22

Civil Action No. 09-4503 SI

**SECOND AMENDED  
CONSENT DECREE**

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*United States v. Pacific Gas and Electric Company* - Civil Action No. 09-4503 SI - Second Amended Consent Decree

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1 WHEREAS, Plaintiff United States of America, on behalf of the United States  
2 Environmental Protection Agency ("EPA"), has filed a complaint ("Complaint") initiating this  
3 action against Pacific Gas and Electric Company ("PG&E");

4 WHEREAS, the United States alleges that PG&E has constructed and commenced  
5 operation of its 530 megawatt combined cycle, natural gas-fired combustion turbine power plant  
6 located near Antioch, California, known as the Gateway Generating Station ("GGS"), in  
7 violation of the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act  
8 ("Act"), 42 U.S.C. § 7475, and the regulations promulgated thereunder as set forth at 40 C.F.R. §  
9 52.21;

10 WHEREAS PG&E's predecessor-in-interest, Mirant Delta, LLC ("Mirant"), commenced  
11 construction of GGS in late 2001 pursuant to an Authority to Construct ("ATC") issued by the  
12 Bay Area Air Quality Management District ("BAAQMD") on July 24, 2001, which ATC also  
13 constituted a PSD permit;

14 WHEREAS Mirant formally suspended construction of the facility in February, 2002;

15 WHEREAS on March 3, 2003, after making revisions to its federal PSD regulations, EPA  
16 withdrew the delegation of PSD authority from BAAQMD;

17 Whereas BAAQMD believed EPA's withdrawal of delegation of PSD authority did not  
18 affect its authority to extend existing PSD permits;

19 WHEREAS at the request of Mirant, BAAQMD extended the ATC twice, in 2003 and  
20 2005, and believed, at those times, it was also extending the PSD permit;

21 WHEREAS PG&E acquired the unfinished GGS construction project from Mirant in  
22 November, 2006, and resumed construction of the project on February 5, 2007;

23 WHEREAS in January, 2007, BAAQMD transferred the ATC to PG&E and believed it  
24 was also transferring the still-effective PSD permit;

25 WHEREAS EPA alleges that BAAQMD was without authority to extend the PSD permit  
26 after March 3, 2003, and that the PSD permit expired by operation of law 18 months after Mirant

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1 ceased construction in February, 2002;

2 WHEREAS, PG&E denies the material allegations of the Complaint;

3 WHEREAS, this Second Amended Consent Decree does not constitute an admission by  
4 PG&E of any facts or of any liability;

5 WHEREAS, the United States and PG&E (the "Parties") agree that settlement of the civil  
6 claims as alleged in the Complaint is in the public interest and that entry of this Second Amended  
7 Consent Decree without further litigation is the most appropriate way to resolve this action;

8 THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

9 **I. JURISDICTION AND VENUE**

10 1. This Court has jurisdiction over the subject matter of this action and over the Parties  
11 pursuant to section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1331, 1345, 1355,  
12 and 1367. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and 1395, and 42  
13 U.S.C. § 7413(b). PG&E consents to and shall not challenge entry of this Second Amended  
14 Consent Decree or this Court's jurisdiction to enter, enforce, modify, or terminate this Second  
15 Amended Consent Decree.

16 **II. APPLICABILITY AND BINDING EFFECT**

17 2. Each signatory to this Second Amended Consent Decree certifies that he or she is fully  
18 authorized to enter into the terms and conditions of this Second Amended Consent Decree and to  
19 execute and legally bind the party for whom the signatory has signed.

20 3. The provisions of this Second Amended Consent Decree shall apply to and be binding  
21 upon the United States and PG&E, its subsidiaries and divisions, and its successors and assigns.  
22 Any change in ownership or corporate status of PG&E, including, but not limited to, any transfer  
23 of assets or real or personal property, shall in no way alter PG&E's responsibilities under this  
24 Second Amended Consent Decree.

25 **III. CIVIL PENALTY**

26 4. Within thirty (30) days after the entry of this Second Amended Consent Decree, PG&E  
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shall pay a civil penalty to the United States of twenty thousand dollars (\$20,000.00). Payment shall be made by Electronic Funds Transfer ("EFT") to the United States Department of Justice in accordance with the current electronic funds transfer procedures, referencing DOJ Case Number 90-5-2-1-09753 and the civil action case name and case number. Payment shall be in accordance with written instructions which will be provided to PG&E by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of California following entry of this Second Amended Consent Decree. PG&E shall provide notice of payment, referencing DOJ Case Number 90-5-2-1-09753 and the civil action case name and case number to EPA and the Department of Justice at the addresses set forth in Section IX (Form of Notice).

5. Upon entry of this Second Amended Consent Decree, the United States shall be deemed a judgment creditor for purposes of collection of the penalties required by this Second Amended Consent Decree and enforcement of this Second Amended Consent Decree. In any collection proceeding, the validity, amount, and appropriateness of the civil penalty specified in this Second Amended Consent Decree shall not be subject to review.

#### IV. INJUNCTIVE RELIEF

6. PG&E shall, within thirty (30) days after entry of this Second Amended Consent Decree, submit to the California Energy Commission ("CEC") a Petition to Amend Conditions of Certification in the matter of Gateway Generating Station (00-AFC-1) requesting an Order to Amend the Energy Commission Decision in the matter of Gateway Generating Station (00-AFC-1). The amendments sought by PG&E shall:

(A) immediately lower GGS' current limit for oxides of nitrogen ("NOx") emissions from the combined cycle units from 2.5 parts per million volume ("ppmv") to 2.0 ppmv on a dry basis corrected to 15% oxygen and averaged over any one-hour period;

(B) lower GGS' rolling 12-month NOx emissions cap for the combined cycle units from 174.3 tons per year ("tpy") to 139.2 tpy beginning the first full month after the effective date of this Second Amended Consent Decree;

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1 (C) lower GGS' rolling 12-month SO<sub>2</sub> emissions cap for the combined cycle units from  
2 48.5 tpy to 18.5 tpy;

3 (D) lower GGS' current limit for PM-10 emissions from the combined cycle units from  
4 0.00588 lb/mmbtu when the heat recovery steam generator ("HRSG") duct burners are not in  
5 operation and 0.00584 lb/mmbtu when the HRSG duct burners are in operation, to 0.004  
6 lb/mmbtu regardless of operation of the HRSG duct burners; and

7 (E) lower GGS' current limit for PM-10 emissions from each of the combined cycle units  
8 from 11.0 lb/hr when the HRSG duct burners are not in operation and 13.0 lb/hour when the  
9 HRSG duct burners are in operation, to 7.50 lb/hr when the HRSG duct burners are not in  
10 operation and 9.0 lb/hr when the HRSG duct burners are in operation.

11 7. PG&E shall, within thirty (30) days after entry of this Second Amended Consent Decree,  
12 submit an application to the Bay Area Air Quality Management District ("BAAQMD")  
13 requesting inclusion in the permit to operate and in the Title V Operating Permit for GGS of  
14 permit conditions which contain all of the terms, requirements, and prohibitions contained in  
15 Paragraph 6, Subparagraphs (A) through (E), above. In addition, PG&E shall request that the  
16 BAAQMD incorporate Condition AQ-13 from the CEC's May 2001 Project Approval for GGS  
17 (then known as "Contra Costa Unit 8") into the permit to operate and into the Title V Operating  
18 Permit for GGS. Condition AQ-13 established a maximum sulfur content for the natural gas  
19 combusted at GGS of 1.0 grain per 100 standard cubic feet.

20 8. Beginning on the effective date of this Second Amended Consent Decree, and  
21 notwithstanding any permitting action by the CEC and/or BAAQMD, all of the terms,  
22 requirements, and prohibitions contained in Paragraph 6, Subparagraphs (A) through (E), above,  
23 and Paragraph 11, below, shall apply to GGS. Any violation of the terms, requirements, and  
24 prohibitions contained in Paragraph 6, Subparagraphs (A) through (E), above, and Paragraph 11,  
25 below, shall constitute a violation of this Second Amended Consent Decree. .

26 9. NO<sub>x</sub> emissions during Natural-Gas Combustion Turbine Start-up Mode shall not be

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1 included in calculating compliance with the one-hour emission limit of 2.0 ppmv set forth in  
2 Paragraph 6. CO emissions during Natural-Gas Combustion Turbine Start-up Mode shall not be  
3 included in calculating compliance with the applicable three-hour emission limit set forth in  
4 Paragraph 11. Natural-Gas Combustion Turbine Start-up Mode is the lesser of the first 256  
5 minutes of continuous fuel flow to the natural gas-fired combustion turbine after fuel flow is  
6 initiated or the period of time from natural gas-fired combustion turbine fuel flow initiation until  
7 the natural gas-fired combustion turbine achieves two consecutive continuous emission monitor  
8 data points in compliance with the NOx and CO emission concentration limits set forth in  
9 Paragraphs 6 and 11.

10 10. NOx emissions during Natural-Gas Combustion Turbine Shutdown Mode shall not be  
11 included in calculating compliance with the one-hour emission limit of 2.0 ppmv set forth in  
12 Paragraph 6. CO emissions during Natural-Gas Combustion Turbine Shutdown Mode shall not  
13 be included in calculating compliance with the applicable three-hour emission limit set forth in  
14 Paragraph 11. Natural-Gas Combustion Turbine Shutdown Mode is the lesser of the 30 minute  
15 period immediately prior to the termination of fuel flow to the natural gas-fired combustion  
16 turbine or the period of time from noncompliance with the NOx and CO emission concentration  
17 limits set forth in Paragraphs 6 and 11 until termination of fuel flow to the natural gas-fired  
18 combustion turbine.

19 11. Except as provided by this Paragraph 11, beginning on the effective date of this Second  
20 Amended Consent Decree, PG&E shall not emit carbon monoxide ("CO") from GGS at an  
21 emission rate greater than 2.0 ppmv on a dry basis corrected to 15% oxygen and expressed as a  
22 three-hour average.

23 A. Pursuant to items (1), (2) and (3) of this Subparagraph A, below, and with  
24 Subparagraph B, below, GGS may emit CO at a rate greater than 2.0 ppmv, but in no event  
25 greater than 3.0 ppmv, during whichever schedule for installing new CO catalyst is in effect  
26 pursuant to items (1), (2) and (3). It is the intent of the Parties that the schedule for installing new

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1 CO catalyst at GGS result in the expeditious ordering and installation of CO control catalyst in  
2 order to minimize the risk that CO emissions will exceed 2.0 ppmv and to minimize the duration  
3 of any such excess emissions. For purposes of the schedule for installing new CO catalyst, the  
4 scheduled annual outage ("Annual Outage") at GGS will determine the date for installation. The  
5 Parties assume that each Annual Outage will commence on April 15 of each year, although the  
6 parties acknowledge that the actual schedule for the Annual Outage will vary from year to year.  
7 In the event no Annual Outage at GGS occurs in any year, for purposes of this Paragraph, the  
8 Parties agree that such an outage will be deemed to have commenced on April 15 of that year.

9 (1). Subject to the provisions of items (2) and (3), below, and using data based on actual  
10 emissions of CO from GGS and other reliable information, PG&E shall propose a Projected CO  
11 Emission Exceedance Date ("Projected Exceedance Date") by making a projection of the date  
12 when, due to degradation of the CO catalyst and other factors, CO emissions from GGS are first  
13 anticipated to exceed 2.0 ppmv. PG&E shall submit its Projected Exceedance Date, and all  
14 information on which it is based or that otherwise relates to the Projected Exceedance Date, to  
15 EPA for review and approval on a calendar semiannual basis beginning December 15, 2012  
16 ("Semiannual Submittal"). If PG&E's Projected Exceedance Date is 24 months or less after the  
17 date the Semiannual Submittal containing that Projected Exceedance Date is due, PG&E shall  
18 install new CO catalyst no later than the second Annual Outage after the due date of that  
19 Semiannual Submittal. If EPA disputes PG&E's Projected Exceedance Date in a Semiannual  
20 Submittal, the Parties' disagreement over the Projected Exceedance Date shall be resolved in  
21 accordance with Section VIII (Dispute Resolution). In the event of a dispute arising under this  
22 Paragraph 11, the provisions of Subparagraph C of this Paragraph shall apply. Regardless of  
23 when PG&E orders replacement CO catalyst, PG&E shall install the replacement CO catalyst no  
24 later than during the first Annual Outage following PG&E's receipt of the replacement CO  
25 catalyst.

26 (2) The schedule for installing new CO catalyst pursuant to item (1), above, shall be

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1 extended to the third Annual Outage after the due date of a Semiannual Submittal if all of the  
2 following circumstances occur: 1) a Semiannual Submittal due on December 15 shows that  
3 PG&E's Projected Exceedance Date is more than 24 months after the date that Semiannual  
4 Submittal is due; 2) EPA fails to dispute that the Projected Exceedance Date is more than 24  
5 months after the date the Semiannual Submittal containing that Projected Exceedance Date is  
6 due; 3) the highest three-hour average CO emissions from GGS during the six-month period  
7 prior to the Semiannual Submittal due on December 15 are 1.60 ppmv or lower; 4) by April 15 of  
8 the calendar year following that December 15 Semiannual Submittal, the highest three-hour  
9 average CO emissions from GGS are 1.80 ppmv or higher; and 5) PG&E has ordered new CO  
10 catalyst within seven calendar days after the highest three-hour average CO emissions from GGS  
11 are 1.80 ppmv or higher.

12 (3) In no event shall PG&E order replacement catalyst later than seven calendar days  
13 after the date on which actual CO emissions from GGS reach 1.80 ppmv or higher (except during  
14 periods of startup and shutdown), expressed as a three-hour average. Except as provided by item  
15 (2) above, PG&E shall install the new CO catalyst no later than the second Annual Outage after  
16 actual CO emissions from GGS reach 1.80 ppmv or higher (except during periods of startup and  
17 shutdown). Regardless of when PG&E orders replacement CO catalyst, PG&E shall install the  
18 replacement CO catalyst no later than during the first Annual Outage following PG&E's receipt  
19 of the replacement CO catalyst.

20 B. If PG&E complies with the requirements of Subparagraph A of this Paragraph 11,  
21 emissions of CO in excess of 2.0 ppmv, but not greater than 3.0 ppmv, will not subject PG&E to  
22 civil liability for violation of this Consent Decree, including liability for stipulated penalties for  
23 violation of the 2.0 ppmv CO emission limit, during the last 18 months before the  
24 commencement of the Annual Outage during which new CO catalyst must be installed pursuant  
25 to Subparagraph A.

26 C. Pursuant to the Section VIII (Dispute Resolution) provisions of this Consent Decree, if

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1 the Court rules that the Projected Exceedance Date should have been earlier than the Projected  
2 Exceedance Date proposed by PG&E in a Semiannual Submittal, both the installation schedule  
3 established pursuant to Subparagraph A of this Paragraph 11 and the 18-month period described  
4 in Subparagraph B of this Paragraph 11 shall be based upon the Projected Exceedance Date as  
5 determined by the Court.

6 D. The provisions of this Paragraph 11 shall only apply to the first time PG&E installs  
7 replacement catalyst at GGS. Within 30 days after PG&E orders replacement catalyst pursuant  
8 to this Paragraph 11, PG&E shall submit to the CEC a Petition to Amend Conditions of  
9 Certification in the matter of Gateway Generating Station (00-AFC-1) requesting an Order to  
10 Amend the CEC Decision in the matter of Gateway Generating Station (00-AFC-1). The  
11 amendments sought by PG&E shall lower GGS' limit for CO from the combined cycle units  
12 from 6.0 ppmv to 2.0 ppmv on a dry basis corrected to 15% oxygen and averaged over any three-  
13 hour period. The lowering of the CO emission rate for GGS shall be effective immediately after  
14 PG&E installs replacement catalyst at GGS. Within 30 days after PG&E orders replacement  
15 catalyst pursuant to this Paragraph 11, PG&E shall submit an application to the BAAQMD  
16 requesting inclusion in the permit to operate and in the Title V Operating Permit for GGS of  
17 permit conditions which lower GGS' limit for CO from the combined cycle units from 6.0 ppmv  
18 to 2.0 ppmv on a dry basis corrected to 15% oxygen and averaged over any three-hour period.  
19 The lowering of the CO emission rate for GGS shall be effective immediately after PG&E  
20 installs replacement catalyst at GGS.

21 12. Beginning on the date of entry of this Second Amended Consent Decree, PG&E shall  
22 provide EPA, as provided in Section IX (Form of Notice), detailed excess emission reports for  
23 NOx and CO emissions as described at 40 C.F.R. § 60.7(c). These reports shall be submitted  
24 within 30 days after the end of each calendar quarter and shall cover that preceding calendar  
25 quarter. The first report shall cover the partial calendar quarter from the date of entry of this  
26 Second Amended Consent Decree through December 31, 2010.

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## V. ENVIRONMENTAL MITIGATION PROJECTS

13. By January 1, 2010, PG&E shall submit applications to the CEC and/or BAAQMD, as necessary, for the installation of the General Electric OPFLEX Turndown and OPFLEX Startup NOx products as described in Paragraphs 14 and 15, below.

14. By January 1, 2011, PG&E shall install and make fully operational at GGS' combined cycle units the General Electric OPFLEX Turndown product. EPA is requiring use of this product in order to allow the combined cycle units to run at low capacity, thereby avoiding shut downs, startups, and the higher NOx emissions associated with startups.

15. By January 1, 2011, PG&E shall install and make fully operational at GGS' combined cycle units the General Electric OPFLEX Startup product. EPA is requiring use of this product in order to reduce the higher NOx emissions associated with startups.

## VI. STIPULATED PENALTIES

16. PG&E shall pay the following stipulated penalties for failure to comply with this Second Amended Consent Decree:

(a) Failure to submit any of the applications as required pursuant to Paragraphs 6, 7, 11, or 13 above: \$500 per day for each failure to apply.

(b) Failure to submit any of the reports as required pursuant to Paragraph 12 above: \$500 per day for each failure to submit.

(c) Failure to pay the civil penalty required pursuant to Paragraph 4 above: \$500 per day.

(d) Failure to implement either of the projects required pursuant to Section V (Environmental Mitigation Projects) above: \$500 per day for each failure to implement.

(e) Failure to comply with the one-hour NOx emissions limitation of 2.0 ppmv in Paragraph 6 and incorporated into Paragraph 8: where the emission level constituting a violation is less than or equal to 3.0 ppmv, \$500 per violation; where the emission level constituting a violation is greater than 3.0 ppmv and GGS has exceeded the 2.0 ppmv limit on 15 or fewer days

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1 in the existing calendar year, \$2,000 per violation; where the emission level constituting a  
2 violation is less than or equal to 3.0 ppmv and GGS has exceeded the 2.0 ppmv limit on more  
3 than 15 days in the existing calendar year, \$5,000 per violation; and where the emission level  
4 constituting a violation is greater than 3.0 ppmv and GGS has exceeded the 2.0 ppmv limit on  
5 more than 15 days in the existing calendar year, \$10,000 per violation.

6 (f) Failure to comply with the applicable three-hour CO emissions limitation in  
7 Paragraph 11: where GGS has exceeded the applicable three-hour CO emissions limitation on 15  
8 or fewer days in the existing calendar year, \$5,000 per violation; and where GGS has exceeded  
9 the applicable three-hour CO emissions limitation on more than 15 days in the existing calendar  
10 year, \$10,000 per violation.

11 (g) Failure to comply with the rolling 12-month NOx emissions limitation in  
12 Paragraph 6 and incorporated into Paragraph 8: \$20,000 per ton in excess of the applicable limit.

13 17. PG&E shall notify EPA in writing of any failure to meet Second Amended Consent  
14 Decree requirements for which stipulated penalties may be due as soon as it has knowledge of  
15 such failure.

16 18. All stipulated penalties shall begin to accrue on the day after the complete performance  
17 is due or the day that a violation occurs, and shall continue to accrue through the final day of the  
18 completion of the activity or the correction of the noncompliance. Nothing herein shall preclude  
19 the simultaneous accrual of separate stipulated penalties for separate violations of this Second  
20 Amended Consent Decree. Penalties shall accrue regardless of whether EPA has notified PG&E  
21 of a violation.

22 19. Stipulated penalties owed to the United States shall be paid by certified or cashier's  
23 check, payable to the "U.S. Department of Justice," and referencing this Second Amended  
24 Consent Decree by caption, civil action number, and DOJ Ref.# 90-5-2-1-09753. PG&E must  
25 deliver any such payments by certified mail with return receipt requested to:

26  
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United States Attorney  
 Northern District of California  
 Attention: Financial Litigation Unit  
 450 Golden Gate Ave, 10<sup>th</sup> Floor  
 San Francisco, California 94102

20. Concurrently with making any payment for stipulated penalties, PG&E must send notice of payment to EPA and DOJ directed to the addresses provided in Section IX (Form of Notice). The notice of payment shall also identify: (a) the specific provision of Section VI (Stipulated Penalties) related to such payment, and (b) a description of the violation(s) of this Second Amended Consent Decree for which the stipulated penalties or interest are being tendered.

21. Any stipulated penalty accruing pursuant to this Second Amended Consent Decree shall be payable upon demand and due not later than thirty (30) days from EPA's written demand. The United States may, in its unreviewable discretion, waive payment of any portion of stipulated penalties that may accrue under this Second Amended Consent Decree.

22. If PG&E fails to pay stipulated penalties owed pursuant to this Second Amended Consent Decree within thirty (30) days of receipt of a written demand, it shall pay interest on the late payment for each day of late payment after the initial thirty-day time period. The rate of interest shall be the most recent interest rate determined pursuant to 28 U.S.C. § 1961.

#### **VII. FORCE MAJEURE**

23. For purposes of this Second Amended Consent Decree, a "Force Majeure Event" shall mean an event that has been or will be caused by circumstances beyond the control of PG&E, its contractors, or any entity controlled by PG&E that delays compliance with any provision of this Second Amended Consent Decree or otherwise causes a violation of any provision of this Second Amended Consent Decree despite PG&E's best efforts to fulfill the obligation. "Best efforts to fulfill the obligation" include using the best efforts to anticipate any potential Force Majeure Event and to address the effects of any such event (a) as it is occurring and (b) after it has occurred, such that the delay and any adverse environmental effect of the violation is minimized

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1 to the greatest extent possible.

2 24. Notice of Force Majeure Events. If any event occurs or has occurred that may delay  
3 compliance with or otherwise cause a violation of any obligation under this Second Amended  
4 Consent Decree, as to which PG&E intends to assert a claim of Force Majeure, PG&E shall  
5 notify the United States in writing as soon as practicable, but in no event later than twenty-one  
6 (21) calendar days following the date PG&E first knew, or by the exercise of due diligence  
7 should have known, that the event caused or may cause such delay or violation. In this notice,  
8 PG&E shall reference this Paragraph of this Second Amended Consent Decree and describe the  
9 anticipated length of time that the delay or violation may persist, the cause or causes of the delay  
10 or violation, all measures taken or to be taken by PG&E to prevent or minimize the delay and any  
11 adverse environmental effect of the violation, the schedule by which PG&E proposes to  
12 implement those measures, and PG&E's rationale for attributing a delay or violation to a Force  
13 Majeure Event. PG&E shall adopt all reasonable measures to avoid or minimize such delays or  
14 violations. PG&E shall be deemed to know of any circumstance which PG&E, its contractors, or  
15 any entity controlled by PG&E knew or should have known.

16 25. Failure to Give Notice. If PG&E fails to comply with the notice requirements of this  
17 Section, the United States may void PG&E's claim for Force Majeure as to the specific event for  
18 which PG&E has failed to comply with such notice requirement.

19 26. United States's Response. The United States shall notify PG&E in writing regarding  
20 PG&E's claim of Force Majeure within twenty (20) business days of receipt of the notice  
21 provided under Paragraph 24. If the United States agrees that a delay in performance has been or  
22 will be caused by a Force Majeure Event, the United States and PG&E shall stipulate to an  
23 extension of deadline(s) for performance of the affected compliance requirement(s) by a period  
24 equal to the delay actually caused by the event. In such circumstances, an appropriate  
25 modification shall be made pursuant to Section XIII (Modification) of this Second Amended  
26 Consent Decree.

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1        27. Disagreement. If the United States does not accept PG&E's claim of Force Majeure, or  
2 if the United States and PG&E cannot agree on the length of the delay actually caused by the  
3 Force Majeure Event, the matter shall be resolved in accordance with Section VIII (Dispute  
4 Resolution) of this Second Amended Consent Decree.

5        28. Burden of Proof. In any dispute regarding Force Majeure, PG&E shall bear the burden  
6 of proving that any delay in performance or any other violation of any requirement of this Second  
7 Amended Consent Decree was caused by or will be caused by a Force Majeure Event. PG&E  
8 shall also bear the burden of proving that PG&E gave the notice required by this Section and the  
9 burden of proving the anticipated duration and extent of any delay(s) attributable to a Force  
10 Majeure Event. An extension of one compliance date based on a particular event may, but will  
11 not necessarily, result in an extension of a subsequent compliance date.

12        29. Events Excluded. Unanticipated or increased costs or expenses associated with the  
13 performance of PG&E's obligations under this Second Amended Consent Decree shall not  
14 constitute a Force Majeure Event.

15        30. Potential Force Majeure Events. The Parties agree that, depending upon the  
16 circumstances related to an event and PG&E's response to such circumstances, the kinds of  
17 events listed below are among those that could qualify as Force Majeure Events within the  
18 meaning of this Section: construction, labor, or equipment delays; malfunction of a combined  
19 cycle unit or emission control device; unanticipated natural gas supply or pollution control  
20 reagent delivery interruptions; acts of God; acts of war or terrorism; and orders by a government  
21 official, government agency, other regulatory authority, or a regional transmission organization,  
22 acting under and authorized by applicable law, that directs PG&E to supply electricity in  
23 response to a system-wide (state-wide or regional) emergency. Depending upon the  
24 circumstances and PG&E's response to such circumstances, failure of a permitting authority to  
25 issue a necessary permit in a timely fashion may constitute a Force Majeure Event where the  
26 failure of the permitting authority to act is beyond the control of PG&E and PG&E has taken all

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1 steps available to it to obtain the necessary permit, including, but not limited to: submitting a  
2 complete permit application; responding to requests for additional information by the permitting  
3 authority in a timely fashion; and accepting lawful permit terms and conditions after  
4 expeditiously exhausting any legal rights to appeal terms and conditions imposed by the  
5 permitting authority.

6 31. As part of the resolution of any matter submitted to this Court under Section VIII  
7 (Dispute Resolution) regarding a claim of Force Majeure, the United States and PG&E by  
8 agreement, or this Court by order, may in appropriate circumstances extend or modify the  
9 schedule for completion of work under this Second Amended Consent Decree to account for the  
10 delay in the work that occurred as a result of any delay agreed to by the United States or  
11 approved by the Court. PG&E shall be liable for stipulated penalties for its failure thereafter to  
12 complete the work in accordance with the extended or modified schedule (provided that PG&E  
13 shall not be precluded from making a further claim of Force Majeure with regard to meeting any  
14 such extended or modified schedule).

#### 15 **VIII. DISPUTE RESOLUTION**

16 32. The dispute resolution procedure provided by this Section shall be available to resolve  
17 all disputes arising under this Second Amended Consent Decree, provided that the Party  
18 invoking such procedure has first made a good faith attempt to resolve the matter with the other  
19 Party.

20 33. The dispute resolution procedure required herein shall be invoked by one Party giving  
21 written notice to the other Party advising of a dispute pursuant to this Section. The notice shall  
22 describe the nature of the dispute and shall state the noticing Party's position with regard to such  
23 dispute.

24 34. The Party receiving such a notice shall acknowledge receipt of the notice, and the  
25 Parties shall expeditiously schedule a meeting to discuss the dispute informally not later than  
26 fourteen (14) days following receipt of such notice.

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1        35. Disputes submitted to dispute resolution under this Section shall, in the first instance,  
2 be the subject of informal negotiations between the Parties. Such period of informal negotiations  
3 shall not extend beyond thirty (30) calendar days from the date of the first meeting between the  
4 Parties' representatives unless they agree in writing to shorten or extend this period.

5        36. If the Parties are unable to reach agreement during the informal negotiation period, the  
6 United States shall provide PG&E with a written summary of its position regarding the dispute.  
7 The written position provided by the United States shall be considered binding unless, within  
8 forty-five (45) calendar days thereafter, PG&E seeks judicial resolution of the dispute by filing a  
9 petition with this Court. If PG&E seeks judicial resolution, the United States's written summary  
10 shall be deemed its initial filing with this Court regarding the dispute. The United States may  
11 submit a response to the petition within forty-five (45) calendar days of filing.

12        37. The time periods set out in this Section may be shortened or lengthened upon motion to  
13 the Court of one of the Parties to the dispute, explaining the Party's basis for seeking such a  
14 scheduling modification.

15        38. This Court shall not draw any inferences nor establish any presumptions adverse to  
16 either Party as a result of invocation of this Section or the Parties' inability to reach agreement.

17        39. As part of the resolution of any dispute under this Section, in appropriate  
18 circumstances the Parties may agree, or this Court may order, an extension or modification of the  
19 schedule for the completion of the activities required under this Second Amended Consent  
20 Decree to account for the delay that occurred as a result of dispute resolution. PG&E shall be  
21 liable for stipulated penalties for its failure thereafter to complete the work in accordance with  
22 the extended or modified schedule, provided that PG&E shall not be precluded from asserting  
23 that a Force Majeure Event has caused or may cause a delay in complying with the extended or  
24 modified schedule.

25        40. The Court shall decide all disputes pursuant to applicable principles of law for  
26 resolving such disputes. In their filings with the Court under Paragraph 36, the Parties shall state

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1 their respective positions as to the applicable standard of law for resolving the particular dispute.

2 **IX. FORM OF NOTICE**

3 41. Unless provided otherwise in this Second Amended Consent Decree, all written  
4 notification, reporting or communication among the Parties required by this Second Amended  
5 Consent Decree shall be addressed as follows:

6 For the United States:

7 Section Chief  
8 Environmental Enforcement Section  
9 United States Department of Justice  
10 P.O. Box 7611  
11 Washington, DC 20044-7611  
12 DJ Ref.# 90-5-2-1-09753

13 and

14 Allan Zabel  
15 Senior Counsel  
16 Office of Regional Counsel (ORC-2)  
17 United States Environmental Protection Agency - Region IX  
18 75 Hawthorne Street  
19 San Francisco, CA 94015

20 and

21 Steve Frey  
22 Senior Engineer  
23 Air Division (Air-5)  
24 United States Environmental Protection Agency - Region IX  
25 75 Hawthorne Street  
26 San Francisco, CA 94015

27 For PG&E

28 Randal S. Livingston  
Vice President – Power Generation  
Pacific Gas and Electric Company  
P.O. Box 770000, Mail Code N11E  
San Francisco, CA 94177

Ronald A. Gawer  
Senior Plant Manager – Gateway Generating Station  
Pacific Gas and Electric Company  
3225 Wilbur Avenue  
Antioch, CA 94509

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David R. Farabee  
Pillsbury Winthrop Shaw Pittman LLP  
50 Fremont Street  
San Francisco, CA 94105-2228

Matthew A. Fogelson  
Pacific Gas and Electric Company  
P.O. Box 7442, B30A  
San Francisco, CA 94120-7442

The United States, EPA or PG&E may change the address to which notices shall be sent by notifying the Parties in writing at the above addresses.

42. Unless the United States and EPA agree to a different form of submission, notification to or communications with the United States or EPA shall be deemed submitted on the date they are (1) received or (2) sent, if sent by overnight express mail.

#### **X. PROHIBITION ON NETTING CREDITS OR OFFSETS**

43. Emission reductions at GGS that result from actions taken or to be taken by PG&E to comply with the requirements of this Second Amended Consent Decree shall not be considered as a creditable contemporaneous emission decrease for the purpose of obtaining a netting credit or offset under the Clean Air Act's Nonattainment New Source Review and PSD programs

44. The limitations on the generation and use of netting credits and offsets set forth in the previous Paragraph do not apply to emission reductions achieved at GGS that are greater than those required under this Second Amended Consent Decree. For purposes of this Paragraph, emission reductions at GGS are greater than those required under this Second Amended Consent Decree if they result from GGS's compliance with federally-enforceable emission limits that are more stringent than those limits imposed on GGS under this Second Amended Consent Decree and under applicable provisions of the Clean Air Act or the applicable implementation plan for the BAAQMD portion of California.

45. Nothing in this Second Amended Consent Decree is intended to preclude the emission reductions generated under this Second Amended Consent Decree from being considered as creditable contemporaneous emission decreases for the purpose of attainment demonstrations

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submitted pursuant to § 110 of the Act, 42 U.S.C. § 7410, or in determining impacts on National Ambient Air Quality Standards, PSD increment, or air quality related values, including visibility, in a Class I area.

#### XI. RESOLUTION OF PAST CIVIL CLAIMS

46. This Second Amended Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging of this Second Amended Consent Decree. The United States and EPA retain all authority and reserve all rights to take any and all actions authorized by law to protect human health and the environment.

47. Except as provided in Paragraph 46 above, the United States and EPA hereby reserve all statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, civil, criminal, or administrative, including those that may pertain to PG&E's failure to comply with any of the requirements of this Second Amended Consent Decree.

#### XII. EFFECTIVE DATE AND TERMINATION

48. This Second Amended Consent Decree will take effect on the date it is entered by the Court.

49. If, for any reason, the Court should decline to approve this Second Amended Consent Decree in the form presented, then this agreement is voidable at the discretion of any Party, and the terms of this Second Amended Consent Decree may not be used as evidence in any litigation between the Parties.

50. The provisions of Paragraphs 6 through 10 and 12 of Section IV (Injunctive Relief) of this Second Amended Consent Decree shall terminate when all of the following conditions have been met:

(a) PG&E has satisfactorily complied with the requirements set forth in Paragraphs 6 through 10 of Section IV (Injunctive Relief) for a period of not less than 12 consecutive calendar months; and

(b) The BAAQMD has issued a permit to operate for GGS containing the limits set

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1 forth in Paragraph 7; and

2 (c) PG&E has completed the actions required by Section V (Environmental  
3 Mitigation Project); and

4 (d) PG&E has paid the civil penalty as set forth in Section III (Civil Penalty);  
5 stipulated penalties, if any, as specified in Section VI (Stipulated Penalties); and the United  
6 States' enforcement expenses, if any, as specified in Section XVI (Payment of Enforcement  
7 Expenses).

8 51. For purposes of Paragraph 50, PG&E shall be deemed to have satisfactorily complied  
9 with the requirements set forth in Paragraphs 6 through 10 of Section IV (Injunctive Relief) if the  
10 United States has not collected any stipulated penalties for violations of this Second Amended  
11 Consent Decree occurring during the 12-month period, and during the 12-month period there are  
12 no unresolved demands for stipulated penalties for violations of this Second Amended Consent  
13 Decree.

14 52. All remaining provisions of this Second Amended Consent Decree shall terminate after  
15 PG&E satisfactorily complies with all requirements of Paragraph 11, complies with the 2.0 ppmv  
16 emission limit for CO for not less than 12 consecutive calendar months after replacement of the  
17 CO catalyst, and receives a final amended permit to operate and a final amended Title V permit  
18 from the BAAQMD which contain the 2.0 ppmv emission limit for CO. PG&E shall be deemed  
19 to have satisfactorily complied with the remaining provisions of this Second Amended Consent  
20 Decree if the BAAQMD issues a final amended permit to operate and a final amended Title V  
21 permit which contain the 2.0 ppmv emission limit for CO, the United States has not collected any  
22 stipulated penalties for violations of this Second Amended Consent Decree during the 12-month  
23 period preceding PG&E's initiation of termination, and during the 12-month period preceding  
24 such initiation of termination there are no unresolved demands for stipulated penalties for  
25 violations of this Second Amended Consent Decree.

26 53. PG&E shall initiate termination of any provision of this Second Amended Consent

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1 Decree by submitting a notification to the United States that all conditions for termination  
2 pursuant to Paragraphs 50 through 52, as applicable, have been satisfied. If the United States  
3 agrees with PG&E's notification, then the Parties shall file a joint motion or stipulation for  
4 termination. If the United States does not agree, PG&E may invoke Dispute Resolution under  
5 Section VIII (Dispute Resolution) of this Second Amended Consent Decree.

#### 6 **XIII. MODIFICATION**

7 54. The terms of this Second Amended Consent Decree may be modified only by a  
8 subsequent written agreement signed by the United States and PG&E. Where the modification  
9 constitutes a material change to any term of this Second Amended Consent Decree, it shall be  
10 effective only upon approval by the Court.

#### 11 **XIV. RETENTION OF JURISDICTION**

12 55. Until the termination of this Second Amended Consent Decree pursuant to Section XII  
13 (Effective Date and Termination), this Court shall retain jurisdiction over this action and all  
14 disputes arising hereunder for the purposes of implementing, interpreting, and enforcing the terms  
15 and conditions of this Second Amended Consent Decree.

#### 16 **XV. COSTS OF SUIT**

17 56. Each Party shall bear its own costs and attorneys' fees incurred in this action through  
18 the date upon which this Second Amended Consent Decree is entered.

#### 19 **XVI. PAYMENT OF ENFORCEMENT EXPENSES**

20 57. Notwithstanding Section XV (Costs of Suit), PG&E shall pay the United States'  
21 enforcement expenses, including, but not limited to, reasonable attorneys' fees and costs, when  
22 the United States incurs such expenses to enforce the terms of this Second Amended Consent  
23 Decree or to collect any unpaid balance of the civil penalty specified in Section III (Civil Penalty)  
24 and any unpaid balance of stipulated penalties to be paid in accordance with Section VI  
25 (Stipulated Penalties). PG&E shall not be liable for such enforcement expenses if the Court  
26 denies the underlying relief sought by the United States pursuant to this Section XVI (Payment of

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1 Enforcement Expenses).

2 **XVII. SERVICE**

3 58. PG&E has accepted service of process by mail with respect to the Complaint and all  
 4 matters arising under or relating to this Second Amended Consent Decree and has waived the  
 5 formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any  
 6 applicable local rules of this Court, including, but not limited to, service of a summons. PG&E  
 7 has identified, on the attached signature page, the name and address of an agent who is authorized  
 8 to accept service of process with respect to the Complaint and all matters arising under or relating  
 9 to this Second Amended Consent Decree.

10 **XVIII. FINAL JUDGMENT**

11 59. Upon approval and entry of this Second Amended Consent Decree by the Court, this  
 12 Second Amended Consent Decree shall constitute a final judgment of the Court as to the United  
 13 States and PG&E. The Court finds that there is no just reason for delay and therefore enters this  
 14 judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

15 **ORDER**

16 IT IS SO ORDERED:

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 19 Dated: \_\_\_\_\_

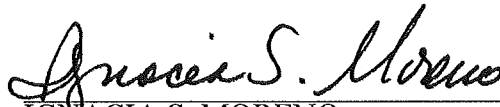
20 United States District Judge

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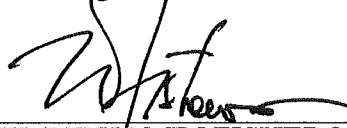
Signature page for *United States of America v. Pacific Gas and Electric Company* Second Amended Consent Decree

FOR UNITED STATES DEPARTMENT OF JUSTICE:

Respectfully submitted,



IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530



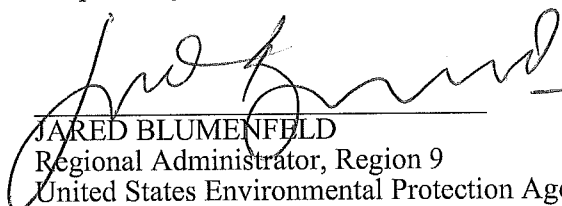
W. BENJAMIN FISHEROW  
Deputy Chief  
BRADLEY R. O'BRIEN  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
U.S. Department of Justice

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3 FOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

4 Respectfully submitted,


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7 JARED BLUMENFELD  
8 Regional Administrator, Region 9  
9 United States Environmental Protection Agency  
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3 FOR PACIFIC GAS AND ELECTRIC COMPANY

4 Respectfully submitted,

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6  
7 RANDAL S. LIVINGSTON  
8 Vice President - Power Generation

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